IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEPHEN KNIGHT LEWIS, Appellant.	No. 32509-8-II (consolidated with No. 33232-9-II)
In re the PERSONAL RESTRAINT PETITION of STEPHEN KNIGHT LEWIS, Petitioner.	UNPUBLISHED OPINION

QUINN-BRINTNALL, C.J. — The jury found Stephen Knight Lewis guilty of three counts of second degree possession of stolen property (counts I, II, III) and one count of second degree theft (count IV) for possession of bank and credit card access devices and the unauthorized use of these cards to withdraw funds. Lewis challenges his conviction, arguing that: (1) the evidence is insufficient to support his conviction; (2) the State's witness impermissibly commented on his right to silence; (3) a biased juror deprived him of his right to a fair trial; and (4) double jeopardy prohibits multiple counts of possession of stolen property and convictions for both possession of stolen property and theft. He also raises numerous arguments

in his opening and pro se briefs and personal restraint petition (PRP) challenging his sentence. We hold that the evidence is insufficient to support Lewis's conviction on second degree possession of stolen property as charged in count III. Therefore, we vacate and dismiss count III. Because we hold that any comment on Lewis's right to remain silent was invited and harmless error, that no biased juror was empanelled, and because double jeopardy protections were not violated, we affirm Lewis's convictions on counts I, II, and IV, and we deny Lewis's PRP. Because we vacate and dismiss count III, we remand for resentencing.

FACTS

Procedural Facts

The State charged Lewis with three counts of second degree possession of stolen property and one count of second degree theft. These charges stemmed from his (1) possession and use of a Providian credit card access device belonging to Jennifer Taylor on April 1, 2004 (count I); (2) possession and use of a Kitsap Federal Credit Union debit card access device belonging to Sandra Kienholz on April 2 and 3, 2004, (count II); (3) possession and use on April 2 and 3, 2004, of a Bank of America credit card access device belonging to Kienholz (count III); and (4) theft due to unauthorized control over Kienholz's property with intent to deprive (count IV).

The jury found Lewis guilty on all counts and the court sentenced him to 14 months on each of the four counts to be served concurrently. The trial court calculated Lewis's offender score at six, adding one point to his prior history because Lewis was on community custody at the time of the current offenses. This appeal followed. The standard range for each offense was 12 to 14 months.

Substantive Facts

On April 1, 2004, Taylor left her purse in her car while she was at Discovery Elementary Park in Gig Harbor. Her Providian credit card and cellular phone were in her purse.

Around 5:30 or 6:00 p.m. she realized her purse had been stolen and reported it to the police. That evening when she called her credit card and cellular phone companies, she discovered her card had been used between 4:00 and 6:00 p.m., which was the time it was apparently taken and when she reported it stolen.

Her cellular phone bill showed that unauthorized calls were also made from her cellular phone to her bank. Her monthly bank statement later showed that unauthorized charges had been made to her bank accounts. Taylor provided the police with information as to the times and particular automated teller machines (ATMs) when her card had been used without her permission.

On April 2, 2004, Kienholz left her purse in her car while she watched her son's soccer game in Gig Harbor. Her Kitsap Federal Credit Union debit card (Kitsap card), a Bank of America Visa, and a government-issued Visa card were in her purse. The pin number for her Kitsap card was listed on the second page of her personal planner. Following the game, Kienholz went on vacation and did not notice that her cards were missing from her purse until a few days later.

Bank of America Visa told her that her Visa card had been used once on Friday, April 2, 2004, at Home Depot in Tacoma. Kienholz had not authorized its use. Kitsap Federal Credit Union informed her that her Kitsap card had been used on April 2, 3, and 4, 2004. Kienholz later testified that she did not give anyone permission for the following Kitsap card transactions: (1)

April 2, 2004, two $200 withdrawals, each with a $2.25 fee, from the Gig Harbor Wells Fargo Bank; and (2) April 3, 2004, two $200 withdrawals from Washington Mutual, 6th Avenue, in Tacoma. She reported the unauthorized use of her cards to the police.

Debra Pelletier, a loss prevention employee of Kitsap Federal Credit Union, also testified that a printout of Kienholz's bank records showed that two $200 withdrawals were made using the Kitsap card at the Gig Harbor Wells Fargo Bank on April 2, 2004, and two other withdrawals from the Washington Mutual located on 6th Avenue in Tacoma were made on April 3, 2004, using the Kitsap card.

Poulsbo Detective Grant Romaine and Gig Harbor Detective Kevin Entze investigated Kienholz's loss. Detective Entze investigated Taylor's loss.

Detective Romaine testified that he received a copy of a printout of Kienholz's records from the Kitsap Federal Credit Union showing the dates and times of the card use. He obtained photographs from Washington Mutual security personnel showing a person, later identified as Lewis, using the drive-up ATM located at 6th and Mildred in Tacoma on April 3, at 12:13 and 12:15 a.m. Looking at the photo, Detective Romaine identified the Kitsap card by its distinctive color scheme.

Working with Washington fraud investigators, Detective Romaine was able to obtain Lewis's name. He interviewed Lewis on April 13, 2004, and showed Lewis the photos. Lewis acknowledged that he was the man in the photos. Lewis explained to Detective Romaine that he used the ATM depicted in the photograph quite often, so his image would be on the film or digital imaging equipment. And he admitted to using the ATM at 12:15 on April 3, 2004.

Lewis also told Detective Romaine that he obtained the card from a friend, but to protect the friend he would not disclose her name. When asked why he did not question his friend regarding the fact that Kienholz's name was on the card and not his friend's name, Lewis said, "[I] never thought as to ask about that." 2 Report of Proceedings (RP) at 278. He then told Detective Romaine that "he receives quite a few debit cards and credit cards from friends of his, mostly women, because he is a ladies' man and they give him their debit and credit cards, tell him to go make withdrawals from their accounts, and go out and have fun with the money."[1] 2 RP at 278.

Detective Romaine arrested Lewis and, during search incident to the arrest, found another credit card on his person with Jane Doe's[2] name on it. No charges were filed for this additional card.

Detective Entze obtained the photographs from Washington Mutual security showing Taylor's card being used on April 3, 2004, at 12:13 and 12:15 a.m. He also obtained photographs of someone, later identified as Lewis, using the Washington Mutual ATM at 6th and Mildred in Tacoma. Other photographs that were not admitted into evidence allegedly showed Lewis accessing Taylor's Providian account at 5:43 and 5:45 p.m. on April 1, at this drive-up ATM.[3]

Detective Entze re-interviewed Lewis on April 30, 2004. He questioned Lewis about the

[1] At trial, Lewis denied talking in detail with Detective Romaine.

[2] We use fictitious names here for privacy reasons.

[3] Other photos from the Gig Harbor Wells Fargo ATM security office allegedly linked Lewis to use of Kienholz's Kitsap card on April 2, 2004, but these were not admitted into evidence. Four pictures in total were admitted at trial. Photos 1 and 2 link Lewis to the use of Taylor's Providian account at 5:43 and 5:45 p.m. on April 1, at the Washington Mutual drive-up ATM; photos 3 and 4 link Lewis to Kienholz's Kitsap account on April 3, at 12:13 and 12:15 a.m. It is undisputed that these are pictures of Lewis at these banks at these times.

earlier interview with Detective Romaine. Detective Entze testified that Lewis remembered talking with Detective Romaine and being shown a series of photographs, but he stated that he did not recall admitting that it was him in the photos. Detective Entze asked Lewis if he remembered telling Detective Romaine about how he always had women giving him their credit cards or identification to use. But Lewis told Detective Entze that he did not remember saying anything like that and he did not want to talk about it anymore. Detective Entze ended the interview and then arrested Lewis for possession of Kienholz's Bank of America Visa, Kienholz's Kitsap card, Taylor's Providian card, and theft.

At trial, Lewis testified that he obtained the ATM card that he used at the Gig Harbor Wells Fargo Bank from his friend, Fiona Philips,[4] on April 1, 2004. He explained that he needed some money and that Philips was going to lend it to him. He arranged to meet her at the Wells Fargo Bank in Gig Harbor. When Philips pulled up in her vehicle, he talked to her for a few minutes and she gave him the card and the pin number; he got back into his vehicle, used the ATM, made two cash withdrawals, and gave the card back to Philips. He said he did not look at the card. He was not sure whose card it was and he did not ask Philips about it. On cross-examination, Lewis said he was not denying that he used the card he got from Philips to take out money on April 1 at the Washington Mutual ATM at 5:45.

Regarding the April 3, 2004 transactions, Lewis stated that the withdrawals took place at the Washington Mutual on 6th Avenue in Tacoma. Around midnight, he was going to a club and

[4] We use fictitious names here for privacy reasons.

needed some money, so he called his friend, Auzine James.[5] They initially met at the Jack in the Box restaurant located beside the bank. James gave him a debit card, but he did not look at the name on it. James did not go with Lewis to the bank; she stayed across the street drinking with her friend. Lewis recalled making two $200 withdrawals with the card that James gave to him.

He testified that he did not know the cards were stolen. He also stated that he never used any credit cards, only debit cards. And he denied ever using these borrowed cards to make purchases.

When asked why these women did not use the cards to withdraw the money to lend to him rather than personally using the cards himself to take out the cash, he replied: "[b]ecause when I met them before, it had always been like that. They gave me the card and just -- I withdrew the money and gave them the card back. And I talked to them a little bit and then went on my way and called them on the phone, to see how things were going with them. That's it."[6] 3 RP at 307-08.

Lewis stated that the detectives never asked him to explain the situation or to provide them with names of the people who gave him the cards. The jury found Lewis guilty on all counts and this appeal followed.

[5] We use fictitious names here for privacy reasons.

[6] Lewis stated that "[i]t wasn't like they just handed me the card. I talked to them first and asked them to borrow some money. And this was not the first time we done this, so she just allowed me to do it again, because I kept my word last time and I paid the money back." 3 RP at 307.

ANALYSIS

Sufficiency of the Evidence

Lewis maintains that the evidence supporting his convictions for second degree possession of stolen property and second degree theft is insufficient as a matter of law. He argues that the evidence is insufficient to show that he knew the property was stolen and that, without this showing, the State cannot establish that he possessed stolen property knowing it was stolen and that he wrongfully obtained property (money) with the intent to deprive the rightful owner of it.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *Thomas*, 150 Wn.2d at 874. We defer to the trier of fact on decisions resolving conflicting testimony and the credibility of witnesses. *Thomas*, 150 Wn.2d at 874-75.

Second Degree Possession of Stolen Property, Counts I, II, and III

One commits the crime of second degree possession of stolen property if he possesses a stolen access device. RCW 9A.56.160(1)(c).

> "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

RCW 9A.56.140(1).

Possession can be actual or constructive. *State v. Summers*, 45 Wn. App. 761, 763, 728 P.2d 613 (1986). If the State proves that the defendant had information that would lead a

reasonable man in the same situation to believe that the property was stolen, then the fact-finder is permitted, but not required, to make the inference that the defendant knew that the property was stolen. *See State v. Shipp*, 93 Wn.2d 510, 512-17, 610 P.2d 1322 (1980) (interpreting RCW 9A.08.010(b) as permitting rather than directing the jury to find that the defendant had knowledge if it finds that the ordinary person would have knowledge under the circumstances); *see also State v. Rockett*, 6 Wn. App. 399, 402, 493 P.2d 321 (1972) (in grand larceny case, proof that defendant had actual knowledge that the items were stolen was not required, finding it sufficient that the defendant had knowledge of facts sufficient to put him on notice that the items were stolen).

Count I: Possession of Taylor's Providian Credit Card on April 1, 2004

The record before us establishes that Taylor's purse and Providian credit card were stolen from her car on April 1, 2004, sometime between 4 to 6 p.m. The card was used without her permission on April 1, 2004, at 5:43 and 5:45 p.m. at the 6th Avenue Washington Mutual drive-up ATM in Tacoma; photographs from that location show Lewis at the drive-up Washington Mutual ATM at 5:43 and 5:45 p.m. on April 1, 2004. Lewis does not dispute that he used the card at that time and location. Lewis only asserts that he had permission to use the card that he claims was given to him by a friend on April 1, 2004, at 5:45 at this location.

Any rational trier of fact could find beyond a reasonable doubt that Lewis possessed a stolen Providian credit card belonging to Taylor on April 1, 2004. It was for the jury to decide the credibility of Lewis's testimony. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We will not substitute our judgment for that of the fact-finder on appeal. *Camarillo*, 115 Wn.2d at 71. Here, it is clear that the jury found Lewis's explanations incredible.

Count II: Possessing Kienholz's Stolen Kitsap Card on April 2 and 3

The record shows that Kienholz's Kitsap card was taken from Kienholz's purse around 3 p.m. in Gig Harbor. She did not give anyone permission to take or use this card. Two more $200 withdrawals were made from her account at the Gig Harbor Wells Fargo Bank on April 2, 2004. Two $200 withdrawals were made at 12:13 and 12:15 a.m. on April 3, 2004, from the Washington Mutual ATM in Tacoma on 6th Avenue. Detectives Entze and Romaine obtained photographs of Lewis at the Washington Mutual ATM on April 3, 2004, at 12:13 and 12:15 a.m. Detective Romaine testified that he knew the card in the photographs was a Kitsap card because he could see the card's distinctive colors. Lewis admitted that he made the withdrawals from the Washington Mutual ATM on that date and time. Again, he testified he had permission to make the withdrawals because his friend, James, let him use the card to withdraw money so he could have funds to go to a night club that evening. The card used had Kienholz's name on it, not James's. Lewis denied knowing that the card was not in James's name. Detective Romaine testified that when he asked Lewis why he did not ask his friend why Kienholz's name was on the card and not his friend's name, Lewis said, "[I] never thought as to ask about that." 2 RP at 278. A jury could infer from this statement that Lewis *knew* this card did not have his friend's name on it.

This evidence is sufficient to support Lewis's conviction for count II. It is uncontested that Lewis used this card at these times. The name indicated on the card, Kienholz, is different than the name of Lewis's friend, James, who he claims gave him permission to use the card. Although Lewis maintained at trial that he did not look at the name appearing on this card and thus did not know something was amiss, that was a credibility determination for the jury to

decide. *Camarillo*, 115 Wn.2d at 71. We defer to the jury on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992). On this evidence, the jury could believe that Lewis knew the card he used was not in his friend's name and thus he had information that would lead a reasonable person in the same situation to believe that the property was stolen, and it could infer that Lewis knew that the property was stolen. *Shipp*, 93 Wn.2d at 512-14; *Rockett*, 6 Wn. App. at 462. Therefore, the evidence is sufficient to support Lewis's conviction on this count.[7]

Count III: Possessing Kienholz's Stolen Bank of America Credit Card on April 2 and 3, 2004

The evidence supporting count III established that Kienholz possessed the card before 3:00 p.m. on Friday and realized it was missing on April 4, 2004. The card was used to make an unauthorized purchase at the Home Depot on April 2, 2004. But no evidence shows that Lewis possessed this stolen credit card or made this unauthorized purchase. No Home Depot photographs were produced and no sales clerk identified Lewis as the purchaser. Lewis was not found with the stolen card in his possession. Thus, the evidence was sufficient to prove someone used the card without permission but insufficient to show that it was Lewis who did this. Accordingly, we vacate count III and dismiss the charge with prejudice. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) **(**retrial following reversal for insufficient evidence is unequivocally prohibited and dismissal is the remedy).

[7] Additionally, Lewis also argues that because no charges resulted from his possession of Doe's bank card, he proved that he did not take the other access cards without permission and was not aware that they were stolen. But this proves only that he was not arrested for, nor charged with, unlawfully possessing Doe's card.

Count IV: Second degree Theft for Withdrawing Funds From Kienholz's Account

Second degree theft occurs when a person commits a theft of property, not a firearm, valued in excess of $250 but less than $1,500. RCW 9A.56.040(1)(a). "Theft" means "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services." Former RCW 9A.56.020(1)(a) (1975-76).

It is undisputed that on April 3, 2004, Lewis used Kienholz's debit card to withdraw $400 from the Washington Mutual drive-up ATM. Lewis contends that he had permission from James to withdraw the money and had no idea the card belonged to someone else. Thus, he argues the State cannot prove that he intended to deprive the owner of her property. The jury apparently did not find Lewis's testimony credible and found that Lewis wrongfully obtained funds in excess of $250 with intent to deprive the true owner: (1) the card was not his; (2) it had a different name than his friend, James, who did not testify and corroborate Lewis's account;[8] (3) he withdrew funds; and (4) he did not give the funds to Kienholz.

Comment on Silence

Lewis next asserts that Detective Entze impermissibly commented on his right to remain silent and that he is entitled to a new trial. We disagree.

Lewis acknowledged and waived his *Miranda*[9] warnings before his interview with

[8] Lewis did not call James or Philips as witnesses. *State v. Blair*, 117 Wn.2d 479, 485-86, 488-90, 816 P.2d 718 (1991) (explaining the missing witness doctrine instructing the jury that they are permitted to infer that the uncalled witness's testimony would have been unfavorable to the party who did not call the witness. This instruction is available when the witness is particularly available to the party, his or her testimony relates to a fundamental as opposed to a trivial issue, and a reasonable probability exists that the party would not fail to call the witness unless the witness's testimony would be damaging); 11 Washington Pattern Jury Instructions: Criminal, § 5.20, at 130 (2d ed. 1994).

Detective Entze. But at some point during the interview, as he was entitled to do, Lewis decided to invoke his right to remain silent and his right to counsel. In a pretrial ruling, the trial court ruled that Detective Entze could testify about his interview with Lewis, but not the location of the police interview, and that no inquiry was to be made about Lewis invoking his rights to a lawyer.

At trial on redirect, Detective Entze made the statement that Lewis contends is a comment on his right to remain silent. Detective Entze testified that he questioned Lewis about his earlier interview with Detective Romaine. On cross-examination, defense counsel elicited testimony that Detective Entze's account of the conversation was incredible because the interview was not tape recorded even though the interview room was equipped for recordings. Defense counsel also elicited that Detective Entze did not get Lewis to make a formal written statement or have him initial the notes that the detective had been taking during the interview. Detective Entze explained that "[t]he conversation did not get to the point to where a written statement was taken." 2 RP at 232.

On redirect, Detective Entze explained that it was not his usual practice to tape interviews in regular cases, reserving taping for the capital-type cases. The prosecutor asked: "You indicated that the interview was stopped before you had an opportunity to do a written statement. Can you please tell the jurors what your usual practice is as far as conducting oral interviews as opposed to written statements?" 2 RP at 235. Detective Entze explained that he talks to a

[9] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

suspect first in order to assess the suspect's willingness to cooperate and takes some initial notes. Regarding Lewis, Detective Entze stated:

> [I]t was my professional opinion that this conversation was not going to go anywhere useful and that at the end of the questions that I had asked of him *he basically said that he didn't want to talk with me anymore without, you know, first probably talking with his lawyer. At that point, by our U.S. Constitution, I have to quit asking him questions. And that was the end.* So there was no formal statement written down to take.

2 RP at 236 (emphasis added).

The State maintains that it was attempting to rehabilitate Detective Entze's credibility regarding interview protocol, that it did not purposely solicit this statement, and that the detective gave a non-responsive answer; it did not repeat the statement at any other point in the trial; and in any event, it was harmless error. Lewis argues that this error was not harmless because the evidence against him was not overwhelming.

We assume without deciding that Lewis may raise this issue for the first time on appeal. *State v. Carnahan*, 130 Wn. App. 159, 169, 122 P.3d 187 (2005).

It is well established that the State may not comment on the exercise of a defendant's right to remain silent. *State v. Easter*, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996).[10] A comment on a defendant's silence occurs when the State uses a defendant's constitutionally permitted silence to the State's advantage by using it as either substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d

[10] As the Supreme Court stated, "[t]he prosecution may not . . . use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation." *Easter*, 130 Wn.2d at 236 (alteration in original) (quoting *Miranda*, 384 U.S. at 468 n.37). "An accused's Fifth Amendment right to silence can be circumvented by the State 'just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself.'" *Easter*, 130 Wn.2d at 236 (quoting *State v. Fricks*, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979)).

235 (1996). Thus, it is impermissible for a police witness to comment on the defendant's silence so as to infer guilt from a refusal to answer questions. *Lewis*, 130 Wn.2d at 705-06. "Most jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence." *Lewis*, 130 Wn.2d at 706.

But here, Lewis's invocation was not used to the State's advantage. It was not offered or admitted as substantive evidence of guilt nor did the State infer that his silence was an admission of guilt. Detective Entze made a factual statement to explain why he did not have Lewis initial his notes or write a formal statement of what Lewis had said orally.

In *State v. Curtis*, on direct examination, the State asked the arresting officer whether anything was said at the time the defendant was read his *Miranda* rights, to which the officer replied: "He refused to speak to me at the time, and wanted an attorney present." 110 Wn. App. 6, 9, 37 P.3d 1274 (2002). The court found that this statement was an impermissible comment on the defendant's exercise of his right to silence explaining that in the context of the case, the State's question and the witness's answer were injected into the trial for no other discernable purpose than to inform the jury that the defendant refused to talk to the police without a lawyer. *Curtis*, 110 Wn. App. at 14.

Similarly, in *State v. Nemitz*, the court held that the Fifth Amendment was violated when the prosecutor gratuitously elicited that the defendant carried his lawyer's card which contained information on the back explaining his rights if stopped on suspicion of driving while under the influence (DUI). 105 Wn. App. 205, 213, 19 P.3d 480 (2001). The court reasoned that given the facts of the case, the only plausible reason to mention the card was to raise the impermissible

inference that defendant's exercise of his rights was an inference of guilt, for only a person disposed to drink and drive would take anticipatory steps to avoid self-incrimination and to assert the right to counsel in the contest of a DUI stop. *Nemitz*, 105 Wn. App. at 215.

But here, Lewis was given *Miranda* warnings and agreed to be and was interviewed. Lewis's counsel opened the door to the extent of the interview when he questioned the interview procedures that Detective Entze used. Defense counsel asked Detective Entze a series of questions regarding the procedures that Detective Entze could have used to memorialize his interview with Lewis. This litany of questions was aimed at undermining Detective Entze's testimony, by showing that his interview procedures were below acceptable standards and, therefore, not reliable, or that Detective Entze was fabricating Lewis's statement and was not credible. During redirect, the State sought to rehabilitate Detective Entze by eliciting why, if Lewis gave a statement, he did not obtain a written statement or tape recording as suggested by the defense. This was proper rebuttal. A party may examine a witness within the scope of the opposing party's previous examination: "It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it." *State v. Jones*, 26 Wn. App. 1, 8-9, 612 P.2d 404 (quoting *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)), *review denied*, 94 Wn.2d 1013 (1980). Thus, if error, Lewis invited it and he cannot now complain of it on appeal. *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal), *cert. denied*, 540 U.S. 875 (2003); *State v. Henderson*, 114 Wn.2d 867, 871, 792 P.2d 514 (1990) (invited error applies to alleged constitutional errors). Moreover, we note that had Lewis timely

objected, the trial court could have given a curative instruction directing the jury to disregard Detective Entze's non-responsive answer, obviating any prejudice. *E.g., State v. Barber*, 38 Wn. App. 758, 771, 689 P.2d 1099 (1984) (limiting instruction could have cured prejudice from improper testimony), *review denied*, 103 Wn.2d 1013 (1985).

We review any improper comment relating to a defendant's silence under the constitutional harmless error standard. *Easter*, 130 Wn.2d at 242. Even if we assume the officer's testimony was a comment on Lewis's silence in light of the overwhelming videotape evidence, the error was harmless and could not have affected the outcome of Lewis's trial.

Juror Bias

Lewis challenges juror 9's impartiality,[11] arguing that he was denied his right to be tried before an impartial jury when this biased juror was seated. He further argues that his counsel was ineffective for permitting a biased juror to be on the jury.

During jury selection, counsel asked the prospective jurors several questions, one of which was, "Have any of you had any personal experience with a similar or related type of case or incident?" 1 RP at 74. Juror 9 revealed that, within the last two years, her mail had been stolen and someone had made unauthorized charges on her credit card. When asked whether the experience would affect her ability to be impartial in this case, she said, "Yes, it would." 1 RP at 80.

Defense counsel then asked: "[D]o you think that in your mind you have already convicted my client, or would your experience just be in the back of your mind so you wouldn't

[11] Lewis refers to this juror as juror 17. This juror is actually juror 9, but was prospective juror 17 during jury selection. We refer to this juror as juror 9.

listen, or are you full of rage and just wouldn't be appropriate for a case like this?" 1 RP at 138. Juror 9 replied that she was not full of rage, these incidents caused her angst, and it was just a lot of work, stating further, "[s]o I just had the feelings kind of come up. But I guess if you decide to choose me I would be fair, try to keep an -- be open minded about it." 1 RP at 139. And when defense counsel asked her whether she could go beyond prejudgment of the defendant and hold the State to its burden of proof and look at the facts, she replied that, yes, she could.

Arguments, if any, regarding jury selection were made off the record. But the record shows that defense counsel used only three peremptory challenges.

Lewis asserts that while this juror would "try" to be fair, it is not the same as a commitment to be fair and, consequently, he was deprived of his right to a fair and impartial jury.[12]

A juror is biased if she has a state of mind toward the defendant that prevents her from impartially trying the issue. RCW 4.44.170(2); *State v. Noltie*, 116 Wn.2d 831, 837, 809 P.2d 190 (1991); *State v. Alires*, 92 Wn. App. 931, 937, 966 P.2d 935 (1998). "'Prejudice' is defined as '[a] forejudgment; bias; partiality; preconceived opinion. A leaning towards one side of a cause for some reason other than a conviction of its justice.'" *Alires*, 92 Wn. App. at 937 (quoting Black's Law Dictionary 1061 (6th ed. 1990)). A juror will not be disqualified in a motion to remove for cause if she can set aside her preconceived ideas. *Noltie*, 116 Wn.2d at 838-40 (finding the trial court did not abuse its discretion in failing to remove a juror for cause when the juror said she would try to be fair, but there was just a possibility that she would start out leaning

[12] Lewis's reliance on *State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001), is misplaced. *Fire* dealt with whether the trial court abused its discretion in denying a for cause challenge against a juror. Lewis's counsel did not challenge juror 9 for cause.

in favor of the State). Implicit in this rule is the notion that a juror who can set aside her preconceived ideas is not actually biased.

Here, juror 9 initially stated that her experience would prevent her from being impartial, but upon further questioning by defense counsel about her bias, she said she would be fair and try to keep an open mind. Lewis's claim that a biased juror was empanelled in his case is without merit.

Moreover, "[t]he law presumes that each juror sworn in a case is impartial and above legal exception; otherwise, he or she would have been challenged for cause. [And a] party accepting a juror without exercising its available challenges cannot later challenge that juror's inclusion." *State v. Reid*, 40 Wn. App. 319, 322, 698 P.2d 588 (1985) (citations omitted). Prejudice cannot be shown based upon the selection and retention of a particular juror when defendant does not use all of his peremptory challenges. *State v. Davis*, 141 Wn.2d 798, 837 n.227, 10 P.3d 977 (2000).

Here, the record does not show that Lewis's attorney challenged juror 9 for bias and he did not use an available peremption to remove her. Because peremptory challenges remained unused, Lewis cannot now object to juror 9, a juror he could have removed but did not. *Davis*, 141 Wn.2d at 837 n.227.

Ineffective Assistance of Counsel

Lewis is also unable to establish that his counsel was ineffective for failing to exercise a peremptory challenge to remove juror 9. To succeed on an ineffective assistance of counsel claim, the defendant must show both that his counsel's performance was deficient and that the deficiency prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). After fully questioning juror 9 regarding her possible bias, the juror stated that she could be fair and would keep an open mind. The record does not support Lewis's claim that a biased juror was empanelled in his case. Lewis's counsel had peremptory challenges remaining and after

questioning juror 9 and developing a rapport with her, counsel made a tactical decision not to excuse her. We will not find ineffective assistance of counsel when the actions of counsel complained of go to the theory of the case or to trial tactics. *State v. Varga*, 151 Wn.2d 179, 199, 86 P.3d 139 (2004).

Pro Se Issues

Pierce County Superior Court transferred Lewis's motion for relief from judgment to us under CrR7.8(c). We accepted the transfer and consolidated his personal restraint petition (PRP) with this direct appeal. Lewis also had a Thurston County matter. Thurston County Superior Court ordered that Lewis's Thurston County motion to modify the judgment in that matter also be transferred to us to be handled as a PRP. CrR 7.8(c). We consolidated the Thurston County PRP with the Pierce County PRP and direct appeal.

Pierce County PRP

Lewis maintains his Pierce County convictions for multiple counts of second degree possession of stolen property and possession of stolen property and theft violate the double jeopardy provisions of the United States and Washington constitutions. He also maintains that he received ineffective assistance of counsel.[13]

Double Jeopardy

Multiple Second Degree Possession of Stolen Property Convictions

Lewis maintains that convicting him of multiple counts of second degree possession of stolen property violates double jeopardy. We disagree.

[13] He also argues that his convictions for possession of stolen property encompass the same criminal conduct for purposes of sentencing. In light of our decision dismissing count III and remanding the case for resentencing, we do not address Lewis's sentencing issues.

Whether a defendant has had his double jeopardy protections violated is a question of law we review de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). The Fifth Amendment of the U.S. Constitution and article 1, section 9 of the Washington State Constitution, which provide the same protections, "protect a defendant from being convicted more than once under the same statute if the defendant commits only one unit of the crime." *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005) (quoting *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002)).

The legislature defined the unit of prosecution in RCW 9A.56.160(1)(c) as each access device in a defendant's possession. *State v. Ose*, 156 Wn.2d 140, 148, 124 P.3d 635 (2005). Thus, double jeopardy prohibitions are not violated by multiple convictions for possessing multiple stolen access devices. *Ose*, 156 Wn.2d at 148. Here, Lewis possessed more than one access device. Counts I and II stemmed from his possession of different access devices: a Providian credit card and a Kitsap card. Accordingly, his multiple convictions for possession of stolen property do not violate double jeopardy.

Convictions for Both Possession of Stolen Property and Theft

Lewis maintains that double jeopardy protections preclude him from being convicted of both second degree possession of stolen property and second degree theft. For support, he cites *State v. Hancock*, 44 Wn. App. 297, 721 P.2d 1006 (1986), which held that one cannot be charged with being both the principle thief and receiver of stolen goods. The court in *Hancock* reasoned that "a man who takes property does not at the same time give himself the property he has taken." 44 Wn. App. at 301 (finding this prohibition of dual convictions for theft and possession of stolen property survived post-1975 enactment of separate statutes for theft and

possession of stolen property) (quoting *State v. Richards*, 27 Wn. App. 703, 707, 621 P.2d 165 (1990)).

But *Hancock* does not apply here. Lewis was not charged with stealing and possessing the *same* property. He was not charged with stealing the underlying access devices and then charged again for possessing those same stolen cards. He was charged with possessing stolen access devices and with theft for using one of those stolen cards to withdraw funds without the owner's permission—a separate offense. Thus, double jeopardy does not prohibit prosecuting Lewis for possessing stolen property (the card) and theft for using the card to steal Kienholz's money.

Ineffective Assistance

Lewis argues that his counsel was ineffective because: (1) juror 9 was wrongly included on the jury; (2) his convictions for both second degree possession of stolen property and theft violate double jeopardy; (3) his counsel gambled at cards with him and his friends; and (4) his counsel gave him insufficient legal advice. These arguments are without merit.

We addressed the issue of juror bias and double jeopardy above and need not do so further.

Lewis claims that he *can* provide affidavits to support his contentions that his counsel gambled with him and provided insufficient legal advice. But Lewis has not provided any evidence that substantiates his claims. Nor has he demonstrated how counsel's alleged conduct, playing cards with a client, is deficient performance that prejudiced his defense. Lewis has not demonstrated deficient performance and resulting prejudice necessary to prove his ineffective assistance of counsel claim. *Thomas*, 109 Wn.2d at 225-26 (to succeed on an ineffective

assistance of counsel claim, defendant needs to show both deficient performance and resulting prejudice).

Thurston County PRP

In his Thurston County PRP, Lewis challenges the calculation of his offender score. Lewis's Thurston County PRP is based on three November 12, 2004 convictions for second degree possession of stolen property committed on July 20, 2003, in Thurston County. Lewis entered an *Alford*[14] plea on these charges. A Thurston County court sentenced him to 17 months based on an offender score of eight. His prior history contributed six points toward his offender score.

Lewis raises three issues. First, he maintains that double jeopardy requires that his Pierce County October convictions for possession of stolen property and theft merged and that the Thurston County court could not use these prior convictions to calculate his offender score for purposes of sentencing him on his November Thurston County convictions.

We previously held that Lewis's convictions for second degree possession of stolen property and second degree theft did not violate double jeopardy. Thus, Lewis's argument fails.

Second, Lewis argues that because the Pierce County court violated *Blakely*[15] by adding one point to his offender score after judicially finding that he was on community custody at the time he committed the Pierce County crimes, the Thurston County court should not have included this extra point toward his prior criminal history in calculating his offender score for his November Thurston County convictions. This argument is also without merit.

---

[14] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[15] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

From our review of the record, the Thurston County trial court properly calculated Lewis's offender score. The Thurston County court did not add a community placement point. Lewis had six prior felony convictions. These six prior convictions contributed six points toward his offender score. In Thurston County, he was convicted of three counts of second degree possession of stolen property and was sentenced for these current offenses. Because the trial court did not find that any of these three current convictions constituted the same criminal conduct, for purposes of calculating his offender score, each of Lewis's current offenses counted as a prior offense. RCW 9.94A.525, .589. This means that his offender score was properly calculated at eight points: six points from his prior felony convictions and two points for his two other current Thurston County felony convictions. We find no error.

But because we vacate and dismiss Lewis's Pierce County conviction of second degree possession of stolen property in count III, Lewis must be resentenced in Thurston County as well as Pierce County.

Lastly, Lewis challenges the Thurston County court's restitution award. It appears he is arguing that the Thurston County court ordered him to pay restitution for charges that were dismissed. But because Lewis has not provided us with any documentation that would enable us to review this issue, we cannot consider it here. *In re Personal Restraint of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990). We do not determine the validity of a PRP where the record does not provide the facts or evidence on which to decide the issue.

We affirm counts I, II, and IV, vacate and dismiss count III, and deny Lewis's PRP. We remand to Pierce County Superior Court for resentencing.[16]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, C.J.

We concur:

BRIDGEWATER, J.

VAN DEREN, J.

[16] We note that our decision vacating and dismissing count III may also require that Lewis be resentenced in Cause No. 04-1-00847-0 by the Thurston County Superior Court.